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No. 01-46

In the Supreme Court of the United States

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Amendment or constitutional principles of state sovereign immunity preclude the Federal Maritime Commission from adjudicating a private party's claim that a state agency has violated the Shipping Act of 1984.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 243 F.3d 165. The opinion of the Federal Maritime Commission (Pet. App. 27a-38a) is not yet reported. The opinion of the Administrative Law Judge (Pet. App. 39a-62a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2001. On May 21, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 10, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2350(a).

STATEMENT

1. The Shipping Act of 1916 was designed to strengthen the United States shipping industry. See, *e.g.*, *Puerto Rico Ports Authority* v. *Federal Maritime Commission*, 919 F.2d 799, 806 (1st Cir. 1990); *Plaquemines Port, Harbor and Terminal District* v. *Federal Maritime Commission*, 838 F.2d 536, 542 (D.C. Cir. 1988). Congress determined that it was necessary to grant antitrust immunity to shipping cartels in order to enable the domestic shipping industry to survive and prosper in an international climate dominated by such cartels. See *Puerto Rico Ports Authority*, 919 F.2d at 807. To prevent abuses of that immunity, the 1916 Act prohibited carriers from engaging in discriminatory practices. See *ibid.* Congress chose to subject maritime terminal facilities to the same non-discrimination requirements in order to effectuate regulation of the carriers. See *ibid.*; *Plaquemines*, 838 F.2d at 542-543.

The Shipping Act of 1916 applied to, *inter alia*, "any person * * * carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities." *California* v. *United States*, 320 U.S. 577, 585 (1944). In *California*, this Court held that state and local instrumentalities engaged in the operation of terminal facilities were "person[s]" subject to the Shipping Act's substantive requirements. *Id.* at 585-586. The Court explained that "with so large a portion of the nation's dock facilities * * * owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *Ibid.*

The Shipping Act of 1916 was subsequently replaced by the Shipping Act of 1984. Section 10(d)(1) of the 1984 Act, 46 U.S.C. app. 1709(d)(1), "tracks the language of § 17 of the 1916 Act except that it substitutes the term 'marine terminal operator' for 'other person subject to this chapter'. The legislative history to the 1984 Act explains that the description of 'marine terminal operator' was taken directly from the 1916 Act's definition of 'other person subject to th[is] chapter'." *Puerto Rico Ports Authority*, 919 F.2d at 801 (citing H.R. Rep. No. 53, 98th Cong., 2d Sess. Pt. 1, at 29 (1984)). In light of Congress's evident intent to maintain in effect the scope of the prior Act's coverage, the courts of appeals in construing the scope of federal regulatory authority under the 1984 Act have recognized that "the intent behind, and prior interpretations of, the 1916 Act's provisions have continuing precedential force." *Plaquemines*, 838 F.2d at 542; accord *Puerto Rico Ports Authority*, 919 F.2d at 801.

2. Enforcement of the Shipping Act of 1984 is entrusted to the Federal Maritime Commission (FMC or Commission). The Act provides that "[a]ny person may file with the Commission a sworn complaint alleging a violation of this chapter * * * and may seek reparation for any injury caused to the complainant by that violation." 46 U.S.C. app. 1710(a). "The Commission shall furnish a copy of a complaint filed pursuant to subsection (a) of this section to the person named therein who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in an appropriate manner and make an appropriate order." 46 U.S.C. app. 1710(b). The Act further provides that "[t]he Commission, upon complaint or upon its own motion, may investigate any

conduct or agreement that it believes may be in violation of this chapter." 46 U.S.C. app. 1710(c). To aid in investigating alleged violations, the Act authorizes the FMC to issue subpoenas compelling the attendance of witnesses and the production of documents. See 46 U.S.C. app. 1711(a). The Act also authorizes the FMC to bring suit in federal district court to enjoin violations during the pendency of the agency proceedings. See 46 U.S.C. app. 1710(h)(1).[1]

Whether an investigation is undertaken on the FMC's own motion or prompted by the filing of a complaint, the FMC must provide an opportunity for a hearing before issuing an order relating to a Shipping Act violation or assessing penalties for such a violation. See 46 U.S.C. app. 1713(a); see also 46 U.S.C. app. 1710(g). The FMC must furnish to all parties a written report of any such investigation that states the FMC's conclusions, decisions, findings of fact, and its order. See 46 U.S.C. app. 1710(f). If an investigation is prompted by the filing of a formal complaint, the investigation takes the form of an adjudication. The FMC has delegated to administrative law judges (ALJs) the authority to make initial or recommended decisions. See 46 C.F.R. 502.223. The hearing is conducted in accordance with the provisions of the Administrative Procedure Act that govern adjudications. See 45 C.F.R. 502.142.

The FMC may review an ALJ decision, either on its own initiative or in response to a party's request. See 46 C.F.R. 502.227. If exceptions to an ALJ decision are filed, the decision becomes inoperative until the FMC

[1] The Act likewise permits a private complainant to sue in federal district court to enjoin a Shipping Act violation during the pendency of the FMC proceedings. See 46 U.S.C. app. 1710(h)(2).

decides the matter. See 46 C.F.R. 502.227(a)(5). In reviewing an ALJ decision, whether in response to exceptions or on its own initiative, the FMC has all of the powers that it would have in making the initial decision. See 46 C.F.R. 502.227(a)(6). If the FMC finds that a violation has occurred, it may issue a nonreparation order. See 46 U.S.C. app. 1710(c), 1710(f), 1713(c). If the investigation was prompted by the filing of a formal complaint, the FMC may also direct payment of reparation to the complainant. See 46 U.S.C. app. 1710(g).

3. Although the FMC has the power to issue such orders, none of its orders is enforceable without a federal court order. The Shipping Act sets out the mechanisms by which FMC orders may be enforced.

The Act authorizes the Attorney General of the United States to bring an action in federal district court to enforce various categories of FMC orders, including nonreparation orders and subpoenas. See 46 U.S.C. app. 1713(c). The Act also provides that "the Attorney General at the request of the Commission may seek to recover the amount [of civil penalties] assessed in an appropriate district court of the United States." 46 U.S.C. app. 1712(e).

In addition, the Act authorizes private parties to bring specified types of enforcement actions. The Act provides that "any party injured" by a violation of a nonreparation order or FMC subpoena "may seek enforcement by a United States district court having jurisdiction over the parties," 46 U.S.C. app. 1713(c), and it authorizes "the person to whom [a reparation award] was made" to seek enforcement of the order "in a United States district court having jurisdiction of the parties," 46 U.S.C. app. 1713(d)(1). The Act does not

authorize the Attorney General to bring an action to enforce a reparation order.

4. a. This proceeding began when South Carolina Maritime Services, Inc. (Maritime Services), a private company that operates vessels used for (*inter alia*) casino gambling, filed a complaint with the FMC. See Pet. App. 39a-41a. The complaint alleged that respondent South Carolina State Ports Authority had refused to give berthing space to a vessel owned by Maritime Services, based on a purported policy of refusing to berth ships whose primary purpose is gambling, while providing berthing space to other vessels offering comparable gambling services. See *id.* at 40a.

Maritime Services alleged that by refusing to give berthing space to its vessel, respondent had violated the non-discrimination requirements of Sections 10(b)(10) and 10(d)(4) of the Shipping Act of 1984, 46 U.S.C. app. 1709(b)(10) and 1709(d)(4). See Pet. App. 41a. The complaint asked that the FMC issue an order compelling respondent to pay reparation and to cease and desist the alleged violations of federal law. See *ibid.* The complaint also asked the FMC to file suit against respondent to obtain a preliminary injunction. See *id.* at 41a n.1.

b. Respondent has previously been held to be an arm of the State of South Carolina protected by the State's sovereign immunity. Pet. App. 3a (citing *Ristow* v. *South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995)). Respondent accordingly moved to dismiss the administrative complaint, invoking the State's Eleventh Amendment immunity. An ALJ granted the motion to dismiss. *Id.* at 39a-62a. The ALJ concluded that the principles of state sovereign immunity reflected in the Eleventh Amendment apply to private complaint proceedings against a state entity before a

federal agency adjudicator. *Id.* at 59a-62a. The ALJ also suggested that a private complaint proceeding would in any event be futile, since a Shipping Act reparation order can be enforced only through a suit brought by "the person to whom the award was made," and a federal district court would lack jurisdiction if a private party brought such a suit against a state agency. *Id.* at 59a n.8. The ALJ noted, however, that "the Commission has the authority to look into allegations of Shipping Act violations and enforce the Shipping Act by means other than *private* complaints," *id.* at 60a, including enforcement proceedings brought by the FMC itself, see *id.* at 60a-61a.

c. The FMC reversed. Pet. App. 27a-38a. The FMC stated that "[t]he Supreme Court has defined the terms of state sovereign immunity, and this definition does not extend to administrative proceedings. All of the recent Supreme Court cases addressing state sovereign immunity involve proceedings against states in judicial tribunals, not before administrative agencies." *Id.* at 31a. After reviewing recent decisions of this Court addressing issues of state sovereign immunity, including *Alden* v. *Maine*, 527 U.S. 706 (1999), and *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the FMC concluded that

> [t]he doctrine of state sovereign immunity, even freed from the linguistic boundaries of the Eleventh Amendment, is meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission. There is no compelling reason offered by either the ALJ or [respondent] to extend the reach of the Supreme Court's holdings in *Seminole Tribe* and *Alden*, and thereby nullify the Com-

> mission's jurisdiction over state ports, which jurisdiction has been in place for decades.

Pet. App. 33a.

The FMC also stated that "[a] private cause of action against an arm of the state brought before an administrative agency, because it invokes the remedial powers of the Executive branch, is in many respects more analogous to a Federal investigation than it is to a suit brought by a private party before a Federal or state court." Pet. App. 34a. It acknowledged that "[t]he Commission is also authorized to initiate investigations on its own motion," but asserted that "Commission investigations, and private complaint proceedings, are part of a unified system of regulation created by Congress under the Shipping Act." *Ibid.*

The FMC also briefly addressed the question whether any order it might issue at the conclusion of the case would be judicially enforceable in a suit brought by Maritime Services. The FMC expressed the view that the Eleventh Amendment would not bar such a suit because the action would be more analogous to a petition for review of an agency order than to a suit filed initially in the district court. Pet. App. 36a. The FMC also stated, however, that issuance of an order resolving the pertinent legal issues would be useful even if the order were ultimately held to be unenforceable, and that the ALJ therefore should not have dismissed the complaint based on the prediction that no enforceable order could result. *Id.* at 37a.

5. Pursuant to the Hobbs Administrative Orders Judicial Review Act, 28 U.S.C. 2341 *et seq.*, respondent filed a petition for review of the FMC's order in the United States Court of Appeals for the Fourth Circuit. The United States and the FMC filed separate briefs as

parties in the court of appeals. See 28 U.S.C. 2344, 2348.[2]

The court of appeals reversed the FMC's decision. Pet. App. 1a-25a. The court emphasized that while the Eleventh Amendment refers specifically to "[t]he Judicial power of the United States," this Court in *Alden* had applied principles of state sovereign immunity to suits brought in state courts. *Id.* at 7a-8a. The court of appeals concluded that "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states" is constitutionally impermissible "whether the forum be a state court, a federal court, or a federal administrative agency." *Id.* at 13a.

The court of appeals also rejected the contention made by the FMC and the United States that sovereign immunity does not apply because the administrative proceeding at issue here is not a "suit in law or equity" within the meaning of the Eleventh Amendment. The court stated that "[w]hether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter. The fundamental fact * * * is

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[2] The United States and the FMC both argued in the court of appeals that the adjudicative proceedings before the FMC were not precluded by principles of state sovereign immunity. The federal parties disagreed, however, with respect to the enforceability of any reparation order that the FMC might ultimately enter. The United States took the position that the Eleventh Amendment would bar any attempt to enforce an FMC reparation order through a suit filed by the private complainant. See U.S. C.A. Br. 26-27. The FMC, by contrast, argued that a private enforcement suit is analogous to a request for judicial review of an administrative order and as such would not be precluded by the State's sovereign immunity. FMC C.A. Br. 41-42.

Because the United States was a party to the proceedings in the court of appeals, it is a respondent in this Court. See Sup. Ct. R. 12.6.

that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state." Pet. App. 13a-14a. The court emphasized, in that regard, that under the FMC's regulations, the "investigation" that is triggered by the filing of a private complaint takes the form of an adjudication and is governed by rules very similar to those that apply to private lawsuits. *Id.* at 15a.

The court also rejected the contention that the FMC's lack of authority to enforce its own orders eliminated any Eleventh Amendment problem by giving a state defendant the practical ability to ignore the FMC proceedings. The court stated that even an unenforceable default judgment would stigmatize the state entity; that the FMC's order might have tangible adverse effects on the State in a subsequent proceeding; and that state officials cannot properly be expected to ignore the directive of a federal official. Pet. App. 17a-18a.[3]

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[3] Having concluded that the same principles of sovereign immunity that apply in court suits also apply in agency proceedings, the court determined that the administrative adjudication at issue in this case does not fall within any of the recognized exceptions to state sovereign immunity. See Pet. App. 19a-22a. Thus, the court explained that respondent had not consented to be sued, *id.* at 19a; that the complaint had not been brought by the United States or another State, *id.* at 19a-21a; that the proceeding was not one brought pursuant to Congress's enforcement authority under Section Five of the Fourteenth Amendment, *id.* at 21a; and that Maritime Services' claim had been brought against respondent itself rather than against state officers acting either in their official or individual capacities, *id.* at 21a-22a. Neither the United States nor the FMC had contested those points.

ARGUMENT

Although we submit that the court of appeals' decision is incorrect, review by this Court is not warranted. The Fourth Circuit is the first court of appeals to apply the principles set forth in *Alden* v. *Maine* to a case involving adjudicative proceedings before a federal administrative agency. Similar questions are presented by cases now pending before three other courts of appeals. The Fourth Circuit's ruling should have little practical significance for the enforcement of the Shipping Act. The petition for a writ of certiorari should therefore be denied.

1. a. The Eleventh Amendment by its terms limits the "Judicial power of the United States" to entertain certain types of "suit[s] in law or equity." U.S. Const. Amend. XI. Before *Alden*, the courts of appeals had uniformly held that States enjoy no immunity in administrative proceedings because administrative tribunals do not exercise the "Judicial power." See *Premo* v. *Martin*, 119 F.3d 764, 769 (9th Cir. 1997) (Eleventh Amendment "does not purport to affect proceedings in tribunals established by statute"), cert. denied, 522 U.S. 1147 (1998); *Tennessee Dep't of Human Services* v. *United States Dep't of Education*, 979 F.2d 1162, 1167 (6th Cir. 1992) ("[c]ourts have found no eleventh amendment bar to actions brought by federal administrative agencies pursuant to complaints of private individuals") (quoting *Ellis Fischel State Cancer Hosp.* v. *Marshall*, 629 F.2d 563, 567 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981)); *Ellis Fischel*, 629 F.2d at 567 ("The eleventh amendment bars *judicial* action, not action by Congress or the executive branch."); *Delaware Dep't of Health & Social Services* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (re-

jecting, in dictum, the contention that the Eleventh Amendment has "any possible application to proceedings before arbitrators"). Since this Court's decision in *Alden*, however, the court of appeals in this case and several district courts have concluded that constitutional principles of state sovereign immunity bar Executive Branch officials from adjudicating claims brought by private parties against unconsenting States.[4]

In *Alden*, this Court held that Congress may not require a State to submit to private suits for money damages brought in the State's own courts. The Court observed that "a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum," because "[a] power to press a State's own courts into federal service to coerce the other branches of the State * * * is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Alden*, 527 U.S. at 749. The Court also explained that the States possess an "immunity from suit," *id.* at 745, not merely an immunity from suit in federal court, and it concluded that a State may not be subjected "'to the coercive process of

[4] See *Connecticut Dep't of Environmental Protection* v. *Occupational Safety & Health Administration*, 138 F. Supp. 2d 285 (D. Conn. 2001); *Florida* v. *United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001), appeal pending, No. 01-12380-HH (11th Cir.); *Ohio Environmental Protection Agency* v. *United States*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000), appeal pending, No. 01-3215 (6th Cir.); *Rhode Island Dep't of Environmental Management* v. *United States*, 115 F. Supp. 2d 269 (D.R.I. 2000), appeal pending, No. 01-1543 (1st Cir.).

judicial tribunals at the instance of private parties,' * * * regardless of the forum," *id.* at 749 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

Alden thus makes clear that a State's sovereign immunity from private suits is not limited to the federal courts. *Alden* does not, however, address the question whether constitutional immunity principles apply to proceedings that, while adjudicative in character, are conducted in an administrative rather than a judicial forum. And to the extent that *Alden* rested on the impropriety of commandeering a State's own courts (and, ultimately, state officials subject to the coercive power of those courts) over the State's objection, its reasoning is inapplicable to proceedings before a federal administrative agency lacking enforcement authority.

b. In their implementation of the Shipping Act, neither the FMC nor its ALJs exercise the "Judicial power" of the United States; the administrative forum is not a "judicial tribunal," 527 U.S. at 749; and the proceedings are not "private suits," *ibid.* Recognition of the non-judicial character of Executive Branch entities underlies the pre-*Alden* cases rejecting claims of immunity in administrative proceedings. In other contexts as well, courts have consistently recognized that an agency "adjudication" cannot be equated with a court proceeding.[5]

In decisions applying the "public rights" doctrine, for example, this Court has long recognized that admin-

[5] Cf. *Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment) (explaining that federal agencies commonly "'adjudicate,' i.e., they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing 'inherently judicial' about 'adjudication.'").

istrative adjudication may share some features of a judicial proceeding without becoming judicial action. The public rights doctrine is grounded "in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently * * * judicial.'" *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). Application of the public rights doctrine involves examination of the law of the States and of England at the time of the framing of the Constitution to identify those disputes that can properly be resolved only by a tribunal wielding judicial power. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-285 (1856). The distinction between controversies that must be decided by courts and those that may properly be committed to the Executive Branch is thus as old as the Constitution itself.[6]

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[6] The public rights doctrine is not limited to disputes in which the government is a party. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 54 (1989) ("In our most recent discussion of the 'public rights' doctrine as it bears on Congress' power to commit adjudication of a statutory cause of action to a non-Article III tribunal, we rejected the view that a matter of public rights must at a minimum arise between the government and others.") (citations and internal quotation marks omitted). As this Court has explained, "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 593-594 (1985); see also *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986) (upholding power of the Commodity Futures Trading Commission to entertain state law counterclaims in reparation proceedings).

c. This Court has described the contempt power as an "inherent" power of all courts "necessary to the exercise of all others." *International Union* v. *Bagwell*, 512 U.S. 821, 831 (1994); see also *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 853 (1986) (concluding that agency was not wielding judicial power because, *inter alia*, the agency's orders were "enforceable only by order of the district court"). The Court in *Alden* focused on that aspect of the judicial power in ruling that a State may not be subjected "'to the coercive process of judicial tribunals at the instance of private parties,' * * * regardless of the forum." *Alden*, 527 U.S. at 749 (quoting *In re Ayers*, 123 U.S. at 505). Neither the FMC nor its delegees possess the contempt power, and their decisions can be enforced only in court and only insofar as enforcement is consistent with the Eleventh Amendment. See 46 U.S.C. app. 1713(c) and (d) (orders may be enforced in a district court "having jurisdiction over the parties"). Because the Eleventh Amendment would preclude a district court from exercising jurisdiction over a nonconsenting State in an enforcement action brought by a private party, the FMC's determination that a state entity has violated the Shipping Act cannot be used in furtherance of a private suit for monetary relief.[7]

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[7] The court of appeals' disposition of this case was based in part on its view that, notwithstanding the FMC's inability to enforce its own orders, state officials would "have an interest in avoiding the stigma that attaches even to an unenforceable default judgment," Pet. App. 17a, and might deem themselves legally obligated to comply with an FMC directive, see *id.* at 18a. But principles of sovereign immunity do not prevent the federal government from imposing legal obligations upon the States. See *Alden*, 527 U.S. at

Thus, the considerations that underlay the Court's decision in *Alden*—*i.e.*, the historical tradition of sovereign immunity from private lawsuits, the need to protect state treasuries from private incursions, and the impropriety of federal commandeering of state courts—are inapplicable here. The text of the Eleventh Amendment reflects the relevant historical distinction between exercises of the federal "Judicial power" and exercises of the Executive Branch's responsibility to investigate and enforce the laws. And the practical concern for the protection of the state fisc and the integrity of state institutions does not support extension of constitutional immunity to federal administrative proceedings conducted before an agency that lacks power to enforce its own orders.

d. For the foregoing reasons, constitutional principles of state sovereign immunity would not foreclose the FMC from issuing a reparation order against respondent. But even if such an order were precluded, the court of appeals' disposition of this case would be incorrect. Maritime Services' administrative complaint requested "an order compelling [respondent] to cease and desist from the * * * alleged violations" in addition to monetary relief for prior economic losses. Pet. App. 41a. If Maritime Services had filed suit in

754-755 ("The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the state a concomitant right to disregard the Constitution or valid federal law."). The Court in *Alden* did not, for example, question the authority of Congress to subject the States to the minimum-wage provisions of the Fair Labor Standards Act. Rather, principles of sovereign immunity restrict the manner in which those legal obligations may be enforced. Because the FMC lacks power to enforce its own orders, those orders are not "coercive" (*id.* at 749) in the relevant sense.

federal district court, the Eleventh Amendment would not have barred its request for a cease-and-desist order so long as individual state officers rather than the state agency itself had been named as defendants. Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), official-capacity suits arising under federal law and seeking prospective injunctive relief are permitted to go forward against state officers, notwithstanding the fact that such suits "generally represent only another way of pleading an action against the entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985).

Notwithstanding Maritime Services' request for prospective non-monetary relief, the court of appeals ordered that the administrative complaint be dismissed in its entirety. The court of appeals' disposition of the case necessarily reflects the view that the pleading requirements that apply to lawsuits against state entities apply, as well as the limits on substantive relief, with equal force in administrative adjudications. That view is misconceived. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Court explained that "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity" because the Eleventh Amendment serves in part "to avoid 'the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties.'" *Id.* at 58 (quoting *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). Because the FMC is not a "judicial tribunal[]" and does not exercise "coercive process," that concern is inapplicable here. Thus, even if the court of appeals were correct in holding that principles of state sovereign immunity bar the FMC from issuing a reparation order against a

state entity, the court's order directing dismissal of the administrative complaint would be erroneous.

2. Although the decision below was incorrect, the petition for certiorari should be denied.

a. The petition states that "[t]he court of appeals' decision holds unconstitutional a provision of the 1984 [Shipping] Act." Pet. 9. That is incorrect. The court of appeals did not in terms declare any federal statutory provision to be unconstitutional; it held only that constitutional principles of state sovereign immunity preclude the FMC and its ALJs from adjudicating private complaints against unconsenting state entities. The court's determination that the FMC has implemented the Act in an unconstitutional manner does not amount to an invalidation of any provision of the Act itself. Cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 246-247 (1984) (explaining that in applying former 28 U.S.C. 1254(2), which authorized appeals from court of appeals decisions holding "'a State statute * * * to be invalid as repugnant to the Constitution,'" this Court "consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute."); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 63 (6th ed. 1986) ("a district court ruling that an administrative agency has interpreted and applied a statute in an unconstitutional manner does not amount to a judicial holding that the statute is unconstitutional 'as a whole' or 'as applied,' so as to be appealable under [former 28 U.S.C.] § 1252.").

Of course, if the court of appeals had understood the Shipping Act to *require* the FMC to conduct formal adjudicative proceedings whenever private complaints are filed against state entities, its holding that the

Constitution bars such proceedings would amount to a determination that an Act of Congress is unconstitutional. The evident premise of the petition for certiorari is that the Act imposes such a requirement. It is not clear, however, whether the court of appeals shared that view of the statute, or whether it regarded the FMC's willingness to adjudicate private complaints against state entities as the product of a discretionary agency policy choice. If the court of appeals interpreted the Shipping Act to grant the FMC discretion to determine whether to adjudicate private claims against state entities, the court's decision invalidating the FMC's chosen mode of enforcement would not amount to an invalidation of the statute itself—even if the court's construction of the Act is incorrect. We therefore do not believe that the court of appeals' decision is properly regarded as unambiguously declaring any federal statutory provision to be unconstitutional.[8]

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[8] This Court has observed that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974). If the FMC believed that the Shipping Act required it to commence formal adjudicative proceedings upon the filing of Maritime Services' complaint, it might naturally have been expected to refer to that statutory obligation, and to the principle articulated in *Johnson*, in its opinion rejecting respondent's Eleventh Amendment claim. In fact, however, the FMC's opinion (see Pet. App. 27a-38a) did not suggest that the Shipping Act requires it to conduct formal adjudicative proceedings when a private complaint is filed against a state entity. Rather, the thrust of the FMC's opinion was that private complaint proceedings are a useful means of enforcing the Shipping Act's substantive prohibitions, not that the statute itself vests private parties with the right to trigger the FMC's adjudicative machinery. See *id.* at 34a-35a. Given the absence of any assertion by the FMC in its opinion that the Shipping Act compelled it to

b. Since this Court's decision in *Alden*, the Fourth Circuit is the only court of appeals that has addressed the question whether principles of state sovereign immunity apply in proceedings before federal agencies. That issue is presented in cases now pending in other courts of appeals, in which States have challenged administrative proceedings initiated pursuant to the "whistleblower" provisions of various environmental statutes. See note 4, *supra*. This Court's review of the constitutional issue presented in this case would benefit from further consideration in additional statutory contexts by the courts of appeals.

c. The court of appeals' decision should have little practical effect on the FMC's enforcement of the Shipping Act. Even in cases where private parties allege Shipping Act violations committed by state entities within the Fourth Circuit, the court's decision would not preclude the FMC from adjudicating a request for a cease-and-desist order or comparable prospective relief, so long as the complaint names the responsible state officers rather than the state agency itself. See Pet. App. 21a-22a (court of appeals acknowledges that "in certain circumstances a private party may sue state officers in their official capacity to prevent ongoing violations of the law," but explains that "[t]his exception [to sovereign immunity] is irrelevant to the case at bar, as the private party brought its complaint for both legal and equitable relief against [respondent] itself."). Whether mandated by the Eleventh Amendment or not, that requirement should pose no practical impedi-

adjudicate Maritime Services' claim, the court of appeals may understandably have regarded the agency's willingness to do so as the product of a discretionary choice rather than of a statutory command.

ment to complainants' efforts to obtain non-monetary relief. And, while the court's decision will prevent the agency from adjudicating private reparation claims against state entities in the Fourth Circuit, any reparation orders that might result from such proceedings would not be enforceable in any event. The Shipping Act does not authorize any federal official to sue to enforce the FMC's awards of monetary relief, see 46 U.S.C. app. 1713 (Attorney General may file suit in federal district court to enforce FMC's nonreparation orders), and the Eleventh Amendment would preclude a private party from suing to enforce such an award.[9]

The petition for certiorari, moreover, identifies no evidence suggesting that private claims of Shipping Act violations committed by state entities have been filed with any frequency. (Nor has any finding been made that a violation occurred in this case.) And nothing in the court of appeals' decision prevents the FMC from continuing to adjudicate any private complaints that may be filed against state entities outside the Fourth Circuit—to the extent (if any) that such entities,

[9] The court of appeals expressed concern that if the FMC were permitted to issue a reparation order in a private complaint proceeding against a state entity, it might then attempt to induce payment by imposing civil penalties for non-compliance. Pet. App. 17a; see 46 U.S.C. app. 1712(a) (authorizing FMC to impose civil penalties for violations of its orders); 46 U.S.C. app. 1712(e) (authorizing Attorney General to file suit to enforce penalties). But while the FMC has taken the view that a reparation order against a state entity would be enforceable by means of a private suit, see Pet. App. 36a-37a, it has not suggested that a penalty proceeding against a State for non-compliance with a reparation order would be either a permissible or an appropriate exercise of administrative authority. Insofar as the court of appeals' decision precludes the FMC from pursuing that course of action, its ruling is therefore unlikely to have any meaningful practical effect.

engaging in activities subject to the Act, exist. Because the court of appeals has not unambiguously declared any federal statutory provision to be unconstitutional, the slight practical consequences of the court's decision weigh substantially against review by this Court at the present time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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